No. 20999

IN THE

United States Court of Appeals For the Ninth Circuit

CONTINENTAL CASUALTY COMPANY,
Appellant,

v.

JESSIE GEDDINGS THOMPSON,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLANT: CONTINENTAL CASUALTY COMPANY

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HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLANT: CONTINENTAL CASUALTY COMPANY

LEGEND OF ABBREVIATIONS USED IN BRIEF

CT—Clerk's Transcript, of record as prepared by Clerk of U. S. District Court.

Ex—Exhibit. Exhibits were offered only by plaintiff; none by defendant.

RT—Reporter's (Court) Transcript, of evidence and proceedings in U. S. District Court (typewritten).

JURISDICTION

The plaintiff Jessie Giddings Thompson is a resident of the State of Washington and sued the defendant Continental Casualty Company, an Illinois corporation, in the

United States District Court for the Western District of Washington, Northern Division. The amount in controversy is over $10,000.00. The action is on contract to recover the face amount of an accident insurance policy in the sum of $25,000.00 resulting from the death of the insured Ralph Everett Thompson. The District Court had jurisdiction under 28 USCA Sec. 1332. Upon the close of plaintiff's evidence the defendant interposed its challenge to the legal sufficiency of plaintiff's evidence to sustain any recovery and moved for a directed verdict (R.T. 358-361). That motion was denied (R.T. 361). The defendant elected to stand on its motion (R.T. 361). The trial resulted in a $25,000.00 verdict for the plaintiff (C.T. 30). Within ten days after the verdict, defendant filed its Motion for Judgment N.O.V. (C.T. 31-32) and its Motion for a New Trial (C.T. 33-35). Each motion was denied (C.T. 36), whereupon Judgment on the Verdict was entered (C.T. 37-38). Within 30 days thereafter Notice of Appeal from said Judgment (C.T. 39) was served and filed and the required appeal bond was also filed. Jurisdiction for this appeal is based on 28 USCA Sec. 1291.

STATEMENT OF CASE

1. Background of Litigation

This action is on contract to recover the face amount of an accident insurance policy in the sum of $25,000. It was a group policy, written by American Casualty Company of Reading Pennsylvania, in favor of the International Organization of Masters, Mates and Pilots (referred to as Union), and its members.

The group policy No. AA17171 (Ex. 4) was issued and

delivered to the Union at its home office in Washington, D. C. on January 1, 1962, the date on which it became effective. The insured Thompson, as a member of the Union, was enrolled under the group policy and became insured thereunder for accidental death resulting from bodily injury in the amount of $25,000, effective July 1, 1962, when Certificate No. 169 (Ex. 3) was issued to him by American Casualty Company.

After the policy was issued, the defendant Continental Casualty Company, an Illinois corporation, took over and assumed all of the risks for which American Casualty Company was liable under the terms of this and other policies written by American Casualty Co.

Both American Casualty Company and Continental Casualty Company are parties defendant to the action and by reason of the assumption of liability by Continental, judgment was entered only against Continental Casualty Company.

The action was originally commenced by Jessie Giddings Thompson, the widow of the deceased insured, Ralph Everett Thompson, in her capacity as executrix of his estate. Because of the fact that Mrs. Thompson, personally, was the beneficiary named in the policy, she was substituted as the plaintiff by order of the District Court (C.T. 9).

QUESTIONS PRESENTED AND POINTS ON WHICH APPELLANT INTENDS TO RELY

a. The death of the insured, Ralph Everett Thompson, was not a "loss resulting directly and independently of all other causes" from "bodily injury" which was "caused by

accident" as defined by the terms of the insurance policy upon which plaintiff sues (Ex. 4). This issue was specifically pleaded by defendant in its answer, as its first affirmative defense (C.T. 6-7).

b. The court erred in refusing, upon the close of plaintiff's evidence, to sustain the defendant's challenge to the legal sufficiency of plaintiff's evidence and to grant defendant's motion for dismissal or a directed verdict. Any verdict of the jury in its determination of the cause of death, under the evidence, could be based only on conjecture and speculation as urged by defendant in its motion for directed verdict, (R.T. 358-361), its Motion for Judgment N.O.V. (C.T. 31) and its Motion for New Trial (C.T. 33).

c. The court erred in submitting the case to the jury for determination.

d. The court erred in receiving and directing to be entered, the verdict of the jury.

e. The court erred in entering its Judgment against the defendant, dated March 18, 1966.

f. The court erred in denying defendant's Motion for Judgment N.O.V.

g. The court erred in denying defendant's Motion for New Trial.

h. The court erred in entering its order, dated March 18, 1966, denying defendant's Motion for Judgment N.O.V. or for a new trial.

i. The court erred in refusing to give defendant's requested Instruction No. 10 and defendant's supplemental requested Instruction No. 1.

. Summary of Facts

The only factual issue in dispute in this action is whether he death of the insured resulted "directly and independ-ntly of all other causes" from "bodily injury caused by ccident" as defined in the insurance policy sued upon. All other material facts are either agreed or supported by ncontradicted testimony.

At the time of his death Mr. Thompson was 47 years of ge. He was just under 6′ 3″ tall and weighed in the neigh-orhood of 212 pounds (R.T. 210). He was big-boned R.T. 210) and huskily built (R.T. 21). In July, 1961, he nderwent an operation for gallstones and appendectomy, nd before that had had a little history of ulcers (R.T. 09-210). After his operation he appeared to be in good ealth.

Mr. and Mrs. Thompson were married in 1949 (R.T. 08-209) and at the time of Mr. Thompson's death were esidents of Monroe, Snohomish County, State of Wash-ngton. Proof of loss was duly and timely made by Mrs. Thompson as required by the terms of the policy.

The following facts are undisputed. The SS CHENA vas and is a liberty-type, steam-propelled freighter owned nd operated by Alaska Steamship Company. The insured Thompson had served as the Third Officer upon said essel from about February 21, 1964 (R.T. 305), until is death on March 28, 1964, during which time he ap-peared to be in good health and had performed his duties atisfactorily.

On Good Friday, March 27, 1964, the CHENA was tied p at the dock in Valdez, Alaska. At the time the earth-quake commenced, approximately 1731 Hours A.S.T. (5:31

P.M.) (Ex. 6), Thompson was on watch aboard the CHENA performing his duties as Third Mate. The earthquake shocks were severe and were followed by large tidal waves. The docks and warehouses completely disintegrated and were destroyed in a matter of minutes. The vessel was tossed about on waves as high as 40 feet and at one point was carried inshore some 300 or 400 feet (R.T. 23). As the waters receded and flowed back and forth during successive tidal waves, the vessel vibrated and was hoved down a number of times on her beam ends in the debris and soft mud in the location where the disintegrated docks and warehouses had been. She rolled and tossed heavily and finally became afloat in the harbor at approximately 1750 Hours A.S.T. (5:50 P.M.) (Ex. 6) after which it experienced no further violence. During this activity much cargo aboard the CHENA was thrown about in the holds, in which nine longshoremen were working, two of whom were killed and one critically injured (R. T. 58).

Shortly after the first shock the insured made his appearance in the pilot house and carried out the orders of the captain to sound the "boat stations" (abandon ship) signal on the ship's whistle (Ex. 6, p. 3) (R.T. 10, 62). The insured remained on the bridge only a few minutes after which he left.

Before discussing Mr. Thompson's activities after leaving the bridge, attention is invited to these facts. Before the earthquake, Mr. Thompson had been very emotionally disturbed as a result of the tragedy of the explosion of the vessel Bunker Hill in which some of his friends and acquaintances were killed. Mr. Thompson had previously served aboard the Bunker Hill (R.T. 306-307) which blew

up on March 6, 1964 (R.T. 304), after he signed on the crew of the CHENA on February 21, 1964 (R.T. 305).

Chester Leighton, the chief engineer of the CHENA, testified that Thompson had been very "shook up" because of the Bunker Hill incident and his friends getting killed on her (R.T. 201). Thompson had said he knew most of the officers on that ship (R.T. 196). Leighton also testified (R.T. 196) that after the Bunker Hill incident, Thompson was going to quit going to sea because "he couldn't take it any more." He also testified that in the ship's salon at meals Thompson brought up the subject of the Bunker Hill frequently (R.T. 196-198).

The chief officer on the CHENA, Neil Larson, also testified (R.T. 132) he had heard Thompson discuss the Bunker Hill incident on occasions in the mess hall.

Captain Stewart also testified that he heard Thompson discussing the Bunker Hill while they were at dinner (R.T. 71). The foregoing incidents are material in light of evidence and statements made by Thompson after he left the bridge.

Apparently the chief officer Larson was the first to see Thompson in one of the passageways on the vessel after he left the bridge. At that time, Larson asked Thompson to go aft with the sailors, who were already there, to help clear the lines from the propeller (R.T. 118). He stated that as Thompson was walking down the passageway, in sort of a daze, he was banging his arms to his head and saying "The Bunker Hill and now this. The Bunker Hill and now this" (R.T. 118). The next time Larson saw Thompson he was lying in his bunk and Larson looked in a medical book in the room for shock treatment where it said to

elevate the lower body and wrap the patient up and keep him warm. He then got the steward and they elevated Thompson's lower body and put several blankets on him (R.T. 120-121).

The chief engineer, Leighton, also encountered Thompson on the engineer's deck as Thompson was going to his room. Leighton described him by saying that Thompson had his hands down at his sides, he was shaking like a leaf and just bearing straight ahead and saying "Bunker Hill, and now this. Bunker Hill, and now this" (R.T. 187, 196).

Dr. Clarence Davis, Jr., who examined Mr. Thompson aboard the CHENA, was engaged in general practice as a private physician in Valdez, Alaska. He arrived aboard the CHENA by launch at about 2100 Hours A.S.T. (9:00 P.M.) March 27 (Ex. 6, page 3). While aboard he attended Mr. Thompson. When he first saw him, Thompson was pale and perspiring. He complained of pains in the front of his chest and that he was short of breath. Thompson's blood pressure was around 120 over 90, his pulse was around 100, his abdomen was unremarkable, his chest was clear to palpitation, and he was orientated but frightened (R.T. 155). Dr. Davis administered morphine sulphate i.m. and placed Mr. Thompson on absolute, strict bed rest. The patient became somewhat more relaxed within the next 45 minutes to an hour when Dr. Davis took some of his past history (R.T. 155). The patient stated he had never had chest pains before; however, he had had some evidence of shortness of breath when he laid down. The patient then went to sleep (R.T. 155). The doctor checked him at intervals during the night and Thompson rested quite peacefully. His blood pres-

sure remained stable and his pulse within normal ranges (R.T. 156). Before Dr. Davis left the CHENA at 0443 Hours A.S.T. (4:43 A.M.), March 28, Mr. Thompson awoke and complained of more chest pains. Dr. Davis gave him another quarter grain of morphine and did not see him again (R.T. 156). The doctor diagnosed the patient's condition as myocardial infarction. Mr. Thompson died at 0745 Hours A.S.T. (7:45 A.M.), March 28, 1964 (Ex. 6, page 4) (Ex. 1, Item 7a and b).

There is no evidence in the case that the insured sustained any traumatic bodily injury as the result of falling, being struck by an object, or accidentally coming in contact with any foreign object or otherwise. The captain testified Thompson went into a state of shock (R.T. 15) but sustained no bodily injury (R.T. 65). The captain also reported to the Coast Guard (Ex. 7, Item 22b) in answer to the question "Nature of injury" that Thompson suffered "No injury; state of shock" and that the cause of death (Ex. 7, Item 22d) also (Ex. 6, page 2) was "Coronary." Dr. Davis testified he examined the insured and found no evidence of traumatic injury to either his body or brain (R.T. 165). In the death certificate (Ex. 1), signed by Dr. Davis, he described Thompson's injury (Ex. 1, Item 27) as "Shock caused by earthquake" and reported the cause of death (Ex. 1, Item 19) as "Acute myocardial infarction."

Dr. Davis testified that Mr. Thompson had what may be termed free floating anxiety (R.T. 158), which he described in layman's language:

> "Free floating anxiety is anxiety without foundation. It is an anxiety that overrides a person's judgment and reason." (R.T. 159).

It is undisputed that no autopsy was performed. Dr. Davis admitted on cross examination that his diagnosis of "acute myocardial infarction" is not an "absolute" in the medical sense, but a clinical diagnosis, and also that death might have resulted from some other cause (R.T. 163). The doctor also testified (R.T. 163) that Thompson did not indicate he had suffered any traumatic injury which he received as the result of the earthquake or shifting of the vessel.

In explaining the term "psychic trauma," which Dr. Davis used in attempting to describe Mr. Thompson's condition, he testified that the word "psychic" means something *within the mind* as distinguished from the brain or the physical components; and that it "is a completely *mental* process" (R.T. 164). He also testified "that the trauma was to his (Thompson's) *thinking* rather than to any part of his *body* or *brain*" (R.T. 164-65) (Emphasis supplied). The doctor also admitted that Mr. Thompson might have had a myocardial infarction had there been no earthquake (R.T. 165).

Dr. Glenn T. Strand, a psychiatrist, was called as an expert witness by plaintiff (R.T. 271). He did not attend Mr. Thompson. He testified that "psychic trauma" would "represent a stress reaction on the part of the individual, initially at the *mind* or *mental* level, with its additional ramifications and effects upon the physiology or physical mechanism of the body as well" (R.T. 272). He then went on to describe the *possible* chain reactions in the system which the sensation of fear *can* produce and how certain organs *could* respond thereto.

In further explaining reactions of individuals who become frightened he expressed the opinion that it has to

do with the predispositional make-up and life experiences of the individual and with factors covering his inheritance, constitution, shock characteristics and what he came into life with, to begin with. It has to do with the nature of the precipitating circumstances themselves that are effecting him; and which may be of particular significance to one person as opposed to another who would not view the situation the same (R.T. 277). The doctor also explained that with respect to one under the influence of psychic trauma that decomposition may occur at a number of different levels, depending upon what is finally manifested to the observing physician (R.T. 277-278).

In addition, the doctor testified he would say that myocardial infarction is a pathological condition of the heart organ or cardiac-musculatore, in which the heart generally has been deprived of either its nutrients or oxygen so that it becomes a piece of dead or dying tissue within the heart musculatore, accompanied usually by a proven symptomology, and it may affect the maintenance of life of the individual as well (R.T. 278-279).

On cross examination, the doctor explained his understanding of the term myocardial infarction which can result from inefficient functioning of the heart as distinguished from the actual death of the heart tissue (R.T. 284).

Further on cross examination, Dr. Strand testified that myocardial infarction is not occasioned by one cause alone (R.T. 284). It can be caused by anything which interferes with the normal blood flow through the coronary circulation of the heart (R.T. 285); by constriction of arteries or blood vessels themselves (R.T. 285); by occlusion or ob-

struction (R.T. 286-287); by a clot, which is a rather common cause and which may be formed either in an area near the heart or further away (R.T. 287); or by a hemorrhage (R.T. 288).

The doctor explained that the ailment of sclerosis, or hardening of the arteries, begins in persons in the embryo before birth and continues to develop gradually thereafter and is more prevalent in persons of the masculine gender (R.T. 288). He acknowledged that myocardial infarction can be caused by an embolism which results from a free floating body which becomes detached from the inside of a sclerotic blood vessel into the blood stream which can carry it to the heart (R.T. 289-290). He testified also that this gradual sclerotic occlusion has been one of the most prominate causes of myocardial infarction (R.T. 292).

Other conditions responsible for myocardial infarction, he testified, include a condition of altered conduction of impulses to the heart, coming from the brain; interference with the conduction system of the heart itself (R.T. 290), or an occlusion or closing of the ostium (R.T. 291). He admitted also on cross examination that myocardial infarction can and frequently does happen to persons even when they are not under stress or undergoing extreme physical exertion (R.T. 291-292) and that it can happen to one while lying in bed (R.T. 292). Also he said that myocardial infarction may be caused by such things as extreme burns, extreme infection, bodily injury, being hit by something or being shot (R.T. 291-292). Further the doctor testified that one cannot determine with absolute certainty the cause of myocardial infarction without an

autopsy, and although an accurate clinical diagnosis in a large percentage of cases can be made, an autopsy is the best means of rendering confirmation of its cause (R.T. 293-294).

It is interesting to note also the doctor's testimony (R.T. 294 - 295) that myocardial infarction frequently *causes* shock.

On redirect examination (R.T. 296) when asked "is fright bodily injury as defined by yourself?" the doctor answered that "In the physiological context, fright *can* constitute bodily injury in terms of the changes most of which are reversible but some can be irreversible" (R.T. 296). He explained reversible as being the ability of the system to overcome the physical changes induced by fright. However, on re-cross examination, the doctor was asked:

"Q. Doctor, isn't it true that in the ordinary sense the words 'bodily injury' mean contact with some foreign object?

"A. I think that is the way I grew up to understand the term." (R.T. 298).

SUMMARY OF ARGUMENT

1. Since this action is one founded on contract, the limits of the liability of the insurance company cannot be extended beyond the risks assumed by it under the terms of the insurance contract or policy.

2. The facts proved in this case do not establish that the insured's death resulted "directly and independently of all other causes" from "bodily injury" caused by accident within the meaning of those terms as used in the policy.

3. In refusing to grant Defendant's challenge to the legal

sufficiency of Plaintiff's evidence and its Motion for a Directed Verdict, on the close of Plaintiff's evidence; and in refusing to give Defendant's Supplemental Instruction No. 1, for a directed verdict in favor of Defendant; and further in denying Defendant's Motion For Judgment N.O.V. or its Motion for a New Trial; and permitting the verdict of the jury in favor of the Plaintiff in the sum of $25,000.00 to be filed; and thereafter entering Judgment in favor of the Plaintiff for the amount of the verdict, the Court permitted recovery under the policy based on conjecture and speculation as to the cause of the insured's death.

4. The Court should have given to the jury Defendant's requested Instruction No. 10 (Appendix A) to the effect that where, from the evidence, death might have resulted from one of several possible causes, the jury could not indulge in conjecture or speculation as to which of the alternative causes might have been responsible for death.

ARGUMENT

Possibilities of Cause of Death

The death certificate (Ex. 1) states the cause of death as "acute myocardial infarction" resulting from shock caused by earthquake. Dr. Davis, the only physician who attended the deceased, admitted that since no autopsy was performed his diagnosis was not "absolute" and that death might have resulted from some other cause. (R.T. 163)

The testimony of the chief engineer, Leighton, is clear that the insured, after the explosion of the Bunker Hill

on March 6, 1964, discussed that tragedy frequently (R.T. 196-198, 201) and was so badly "shook up" that he contemplated quitting the sea because he couldn't take it anymore. The repeated references by the insured immediately following the earthquake to "The Bunker Hill, and now this" indicates clearly that before the earthquake Mr. Thompson was suffering rather profound emotional disturbances. In characterizing Mr. Thompson's condition at the time he examined him, Dr. Davis used the expressions "free-wheeling anxiety" and also "psychic trauma."

In light of the testimony of both of Plaintiff's doctors that the cause of death cannot be determined with absolute certainty without the benefit of an autopsy, which was never performed, the jury had to speculate as to the cause of death.

The evidence is clear that whatever the cause of Mr. Thompson's death may have been, it was not induced by traumatic injury to his "body" or "brain," but by something which originated in the level of the insured's "mind," "thinking," or "mental" processes. See testimony of Dr. Davis (R.T. 164-165). Also, Dr. Strand's testimony is that "psychic trauma" represents a stress reaction which has its inception at the "mind" or "mental" level which, in turn, induces other physiological body reactions (R.T. 272).

Thus, the stress reactions which the insured experienced from the Bunker Hill incident might have been sufficient to have caused an embolism, which is the detachment of substance or tissue from the inside of a sclerotic blood vessel, which thereby gets into the blood stream and is ultimately carried to the heart. That is one of the most

prevalent causes of myocardial infarction (R.T. 292). Or, the stress from the Bunker Hill incident may have caused a clot to form, another common cause of myocardial infarction (R.T. 287) at any time preceding the earthquake, which did not reach the heart until the approximate time of the earthquake. Or, the myocardial infarction could have resulted from any one of the other numerous causes to which that affliction can be attributed as demonstrated by Dr. Strand's testimony set forth earlier in this brief. Myocardial infarction might even have *caused* the shock which the insured suffered (R.T. 294-295) or it could have occurred while the insured was simply lying in bed (R.T. 292).

Words Used in Contract Must Be Construed According to Their Ordinary Meaning

By the terms of the insurance contract here under consideration the insurance company agreed to pay the benefits under the policy

> "for loss resulting *directly* and *independently* of *all other causes* from injury sustained" (Emphasis supplied)

by the insured person. The term "injury" is defined in the first paragraph of the policy (Ex. 4) as follows:

> "Injury whenever used in this policy means *bodily injury* caused by accident occurring while this policy is in force with respect to the insured person. . . ." (Emphasis supplied)

It is defendant's position that the facts do not sustain plaintiff's position that death resulted "directly and independently of all other causes" from "bodily injury" caused by accident within the meaning of those words as used in the policy.

The adjective "bodily" means "pertaining or belonging to the body; it is opposed to mental." (Webster). See also: *Guardian Life Insurance Co. of America v. Richardson*, 129 S.W.2d 1107, 1115, 23 Tenn. App. 194; and *Terre Haute Electric Ry. Co. v. Lauer*, 52 N.E. 703, 706, 21 Ind. App. 466.

In the case of *Provident Life and Accident Insurance Co. v. Campbell*, 79 S.W.2d 292, 296, 18 Tenn. App. 452, action was brought for recovery under double indemnity policies which obligated the insurers for double indemnity if loss resulted "solely from bodily injuries effected directly and exclusively by external, violent and accidental means. . . ." The insured drove his automobile over an infant child, as a result of which he suffered mental shock. The insured died about 30 minutes after the accident. The Court held, at page 304:

> ". . . a purely 'mental shock' due to excitement or 'mental disturbance' such as that disclosed by the proof in the record before us is not a bodily injury within the contemplation of the insurance contracts involved in these cases."

The term "bodily injuries" was construed in *Chase v. Businessmen's Assurance Co. of America*, (C.C.A. 10) 51 F.2d 34, as follows:

> "In their ordinary and popular sense, the phrase, 'bodily injuries' conveys the idea of a cut, bruise or wound, rather than a physical impairment caused by disease." (page 36).

In that case, the policy provided insurance against loss of life only where the death resulted "from bodily injuries effected solely through accidental means." Death resulted from typhoid fever induced by the insured's con-

sumption of polluted water. Recovery was denied.

Also, in *Burns v. Employers' Liability Assur. Corp. Ltd. of London,* 134 Ohio St. 222, 16 N.E.2d 316, 117 A.L.R. 733, the Court construed the words "bodily injury" as used in an accident policy; and near the end of the opinion stated:

> "The words 'bodily injury' are commonly and ordinarily used to designate an injury caused by external violence, and they are not used to indicate disease. We do not speak of sickness as an accident or an injury. When we hear that someone has suffered an accident, we conclude that he has suffered, more or less, some external violent bodily injury. Since the words 'bodily injury' are used in the policy in their common and accepted meaning, it is only by a strained and illogical construction of the words that they can be held to include a disease not resulting from some external violence. We do not think of one suffering from typhoid fever as being bedridden as the result of an accident or injury.
>
> "In order to create liability under a policy insuring against bodily injuries caused directly, solely and independently of all other causes by accidental means, there must be evidence of some external or violent and accidental force or cause."

The following statement of the rule is found in 44 C.J.S. 1155 under the title "Insurance" §294, "Meaning of Language":

> "A contract of insurance should be construed according to the sense and meaning of the words, or terms of the policy, and, if clear and unambiguous, according to their plain, ordinary, usual, and popular sense, unless they were intended to have, or have acquired, a different meaning, or unless their construction by their ordinary meaning would lead to an unreasonable or absurd result."

See also: *Chase v. Businessmen's Assurance Co. of America,* (C.C.A. 10) 51 F.2d 34, 36; *Lincoln National Life Insurance Co. v. Erickson,* (C.C.A. 8) 42 F.2d 997, 1001.

On the question of construction of insurance policies, the Court made the following significant statement in *London Guaranty and Accident Co. v. Leefson,* (C.C.A. 3d) 37 F.2d 488 at page 489:

> "There is perhaps a natural tendency to treat accident insurance policies as though their terms were uniform, but the rights arising from them are contractual, and must be determined with careful reference to the terms of each policy."

Both the plaintiff and the trial court in this action took the position that the issues in the pending action are controlled by the decision of the Washington State Supreme Court in the case of *Pierce v. Pacific Mutual Life Insurance Co.* (1941) 7 Wn.2d 151, 109 P.2d 332. That was an action by an insured to recover under an accident policy which insured against bodily injury sustained solely through accidental means resulting directly, independently and exclusively of all other causes, in total disability.

While the insured in that case was driving his automobile through an intersection he suddenly saw two cars approaching him from opposite directions. One of the approaching cars was partly on the insured's side of the highway. The insured became badly frightened, thinking that under the circumstances he would be unable to avoid a collision. In an endeavor to avoid the collision, he slammed on the brakes of his car, which proceeded at an angle toward the opposite side of the street and came to a stop. The insured became aware of a feeling of weakness in his right arm and by the time his car came to a

stop he had lost consciousness. There was no collision and the insured sustained no external injuries. After regaining consciousness, the insured proceeded to his office and shortly thereafter was taken to a physician who diagnosed his condition as a cerebral hemorrhage or stroke. On appeal the trial court's judgment for the defendant was reversed.

The principal question material to the case at bar, decided by the Supreme Court was: whether or not fright, or mental shock, unaccompanied by physical impact, is sufficient to constitute "accidental means" within the terms of the policy. The Supreme Court in its decision did not specifically construe the words "bodily injury" as used in the policy. The court stated the question and its answer in this language: (160)

> "The second specific question raised is whether or not fright, or mental shock, unaccompanied by physical impact, is sufficient to constitute 'accidental means' within the purport of that term as used in the policies.
>
> "It has been definitely settled in this jurisdiction, in *negligent cases*, that damages are recoverable for personal physical injuries resulting from fright, even though there is no physical impact involving the person sustaining the fright, provided that the negligent act of the defendant was the proximate cause of the fright, *such physical injuries being distinguishable from purely mental distress or psychological disorders.*" (Emphasis supplied) (160)

The opinion went on to state:

> "Although the case at bar is an action upon a contract, and not one arising in tort, the principle of law above stated is equally applicable to both situations. The element of fright supports recovery, not because of the peculiar nature of the action brought, but be-

> cause its connection with physical injury has been recognized. The question is simply one of proximate cause; the nature of the action brought is immaterial." (162)

Thus while the *Pierce* case is authority for the rule that fright, under the factual situation in that case, was an "accidental means," the court did not in its opinion specifically construe the words "bodily injury."

The Supreme Court of Texas rendered a very significant decision in the case of *Pan American Life Insurance Company v. Andrews* (1960) 340 S.W.2d 787. Actions on two separate accident policies were consolidated for trial. The language in these policies were similar and both were more elaborate than the language in the policy involved in the case at bar or in the case of *Pierce v. Pacific Mutual Life Insurance Company, supra.* In the policy written by the Continental Company, in the Andrews case it was provided that the company would be liable if:

> "the death of the Insured has resulted from bodily injuries, effected directly and independently of all other causes through external, violent and accidental means . . ."

The policy states that "This supplemental contract does not cover death resulting from:

> "(a) Bodily injuries of which there is no visible contusion or wound on the exterior of the body, except in case of drowning or internal injury revealed by autopsy . . ."

In this case a fire occurred on December 4, 1953 in the building where the insured had his office. He observed the fire and seemed to be nervous. On the following day it was noticed that he walked with a limp, and on that day the insured called on his doctor and told him, with

considerable emotion, that the fire was very serious so far as he was concerned; that it had him "in a jam" because his records were practically destroyed and it was near the end of the year. Several days thereafter the insured developed some loss of sensation in his extremities and his condition progressively deteriorated. He was examined by a neurologist on December 22 and hospitalized on December 25. On January 4 he underwent brain surgery and died on January 7, 1954, 34 days after the fire. His doctor, who attended him, testified he was of the opinion that the thing that set off the chain reaction that produced his condition was "probably" "psychic trauma"; and that "the fire produced the reaction in his mind, which is capable of producing damage to the cells tissue not only in the brain, but other organs." Another doctor testified he was of the opinion that there was a reasonable probability that the psychic trauma suffered by the insured as the result of the fire, was the cause of the thrombosis.

In commenting on the evidence, the court pointed out, page 789,

> "The psychic trauma was brought about by the anticipation on the part of the insured that records of personal property located in the building were being damaged or destroyed and by the natural concern over the loss of the contents in the insured's office."

An autopsy was performed and only showed the presence of the thrombosis which the doctor testified was "probably" caused by psychic trauma (789). The court commented on the contention of the respondent that where a person suffers physical injury resulting from fright or mental shock caused by the wrongful torturous act of an-

other, that the injured party is entitled to recovery damages; but it stated at page 789:

> "We do not agree, however, that this rule applicable in tort law is to be followed in determining the rights of parties under contractual provisions."

Later in the decision, the court points out, at page 792, that the injury here was wholly and solely caused by a "mental reaction" and then stated:

> "Seemingly the intention of the parties as disclosed by the double indemnity contract was that before recovery could be had it must be determined, with some degree of certainty that death resulted from an accidental injury, but here we have *speculation on speculation. It is speculated that the deceased suffered psychic trauma and then it is speculated that the psychic trauma produced a thrombosis.*" (Emphasis supplied) (792)

The court said further: (792)

> "We can see no distinction between the case at bar and a fatal attack of heart failure suffered by an insured induced by the excitement of watching a football game on a television program or in fact worry brought about by financial or domestic problems if that mental disturbance is said to have caused a thrombosis which in turn caused death."

The opinion concluded in part with the statement, at page 794:

> "There being no evidence that the insured suffered death as a result of bodily injuries effected solely through external, violent or accidental means, recovery of double indemnity benefits must be denied."

In his concurring opinion to the *Pan American v. Andrews* case Judge Smith pointed out that based on the evidence the trial court could not have impliedly made findings which would not include those: that the "wit-

nessing" of the fire produced a "mental" reaction (described as psychic trauma) which was the *means* through which a clot in the arteries was effected; and also that these *means* were entirely mental or psychic, wholly, free of and unaccompanied by any physical force (795). The judge further points out in his concurring opinion, page 795, that:

> "The policies simply do not afford coverage where the cause of death was an unanticipated reaction to the insured's environment."

and also that

> "The most that can be said of the medical testimony offered by the petitioner is that the petitioner's doctors testified that the witnessing of the fire by the insured *may have caused psychic trauma* and was a *possible cause* of the insured's death." (Emphasis supplied)

Judge Smith said also:

> "It should be noted that double indemnity coverage is provided in both policies for *bodily* injury only. It is clear from the evidence that the image or contents of the insured's brain and nervous system was not the sole efficient cause, independent of all other means or causes of the cerebral arterio-thrombosis; but that the sole cause of his death came about as the result of the intervening agency of his mind and nervous system working on the image which was an *entirely internal means*, and, therefore, not external." (795)
>
> ". . . In the present case, there is no physical trauma which can be traced into the insured's body as the sole cause of the insured's death, without the intervention of any other causal means." (796)

Jury Could Not Indulge in Speculation or Conjecture

The Trial Court erred in refusing to give defendants' Requested Instruction No. 10 (Appendix A), and particu-

larly all portions thereof after the first sentence in the instruction as requested. Exceptions to the Court's refusal to give this instruction were taken during the trial (R.T. 388, 389). The jury should have been instructed, as requested in said instruction, that it could not speculate as to the cause of the insured's death. The actual cause of death was not established with reasonable certainty but, rather, by circumstantial evidence, or supposition on supposition. The rule covering such a situation is well stated in the case of *Arnold v. Sanstol*, (1953) 43 Wn.2d 94, 99, 260 P.2d 527, as follows:

> "Such evidence may be direct or circumstantial. When reliance is placed upon the latter type of evidence, there must be reasonable inferences to establish the fact to be proved. No legitimate inference can be drawn that an accident happened in a certain way by simply showing that it might have happened in that way, without further showing that reasonably it could not have happened in any other way. The facts relied upon to establish a theory by circumstantial evidence must be of such a nature and so related to each other that it is the only conclusion that fairly or reasonably can be drawn from them. A verdict cannot be founded on mere theory or speculation. If there is nothing more tangible to proceed upon than two or more conjectural theories, under one or more of which a defendant would be liable, and under one or more of which there would be no liability upon him, a jury will not be permitted to conjecture how the accident occurred. *Gardner v. Seymour*, 27 Wn.2d 802, 808, 180 P.2d 564 (1947), and cases cited; *Carley v. Allen*, 31 Wn.2d 730, 737, 198 P.2d 827 (1948); *Stevens v. King County*, 36 Wn. 2d, 738, 747, 220 P.2d 318 (1950), and cases cited."

This Court, in the case of *Brownlee v. Mutual Ben. Health & Accident Ass'n*, (C.C.A. 9) 29 F.2d 71, 72, recognized the rule set forth in the preceding case and held

that where the evidence in an action on an accident insurance policy is such that the jury can only speculate or guess as to the cause of death, the defendant is entitled to a directed verdict. See also: *Reading Co. v. Boyer* (C.C.A. 3d) 6 F.2d 185; *Philadelphia & R. Ry. Co. v. Cannon* (C.C.A. 3d) 296 Fed. 302; *Spain v. Oregon-Washington R. & N. Co.*, 78 Or. 355, 153 Pac. 470, Ann. Cas. 1917E, 1104; *Medsker v. Portland R., L. & P. Co.*, 81 Or. 63, 158 Pac. 272.

In two decisions by the Supreme Court of Washington, the court cited with approval the following statement from 9 Blashfield, *Cyclopedia of Automobile Law and Practice* (part 2, Perm. ed.) 520, Sec. 6126:

> "The burden of proving proximate cause is not sustained unless the proof is sufficiently strong to remove that issue from the realm of speculation by facts asserting a logical basis for all inferences necessary to support it." *Wilson v. Northern Pacific R. Co.* (1954) 44 Wn.2d 122, 129, 265 P.2d 815; *Paddock v. Tone* (1946) 25 Wn.2d 940, 949, 172 P.2d 481.

The Supreme Court of Washington also stated in *Stevens v. King County* (1950) 36 Wn.2d 738, 747, 220 P.2d 318:

> "We have frequently said that, if there is nothing more tangible to proceed upon than two or more conjectural theories under one or more of which a defendant would be liable and under one or more of which a plaintiff would not be entitled to recover, a jury will not be permitted to conjecture how the accident occurred."

To the same effect see *Gardner v. Seymour* (1947) 27 Wn.2d 802, 809, 180 P.2d 564; and *Carley v. Allen* (1948) 31 Wn.2d 730, 738, 198 P.2d 827.

The Trial Court also erred in refusing to give defend-

ants' Requested Supplemental Instruction No. 1 (Appendix A) directing a verdict in favor of the defendant. This subject has already been fully covered in this brief and need not be repeated here.

CONCLUSION

Since this is an action on contract, the insurance company is liable only to the extent of the risks it undertook to insure against and because of the failure of the Plaintiff to prove that death resulted "directly and independently of all other causes" from "bodily injury caused by accident" as its terms are commonly used and understood, the Judgment of the trial court should be reversed.

Respectfully submitted,

W. Paul Uhlmann
Of Attorneys for Appellant

CERTIFICATE

I hereby certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and, that in my opinion the foregoing brief is in full compliance with those rules.

Respectfully submitted,

W. Paul Uhlmann
Of Attorneys for Appellant

APPENDIX A

DEFENDANTS' REQUESTED INSTRUCTIONS

Defendants Requested Instruction No. 10:

You are instructed that when reliance is placed on circumstantial evidence to establish the cause of death, there must be reasonable inferences from the facts presented from which you can conclude that death was caused as claimed, that is, directly and independently of all other causes from bodily injury caused by accident. No conclusive inference can be drawn that Mr. Thompson's death resulted from a specific cause simply by proof that it might have resulted from that cause, unless you are reasonably satisfied it could not have happened in any other way. The facts relied upon to establish a theory of the cause of death must be of such a nature that it is the only logical conclusion that fairly or reasonably can be drawn from the facts. Your verdict cannot be founded only on theory or speculation. If from the evidence it appears that there is more than one conjectural theory as to what may have caused the death, under one or more of which the insurance company would be liable, and under one or more of which there would be no liability upon it, you are not permitted to conjecture as to what caused the death.

Defendants' Requested Supplemental Instruction No. 1:

You are instructed to return a verdict in favor of the defendant Continental Casualty Company.

APPENDIX B

APPENDIX OF EXHIBITS

The following numbered trial Exhibits constitute part of the record (CT 43). All Exhibits were Plaintiff's Exhibits, references to them are made only by the designation "Ex." References are to RT (Reporter's Transcript).

Exhibit No.	*Identified*	*Offered*	*Admitted*
Plaintiff's 1	16	98	99
Plaintiff's 2	16	105	106
Plaintiff's 3	16	105	106
Plaintiff's 4	16	105	106
Plaintiff's 5	16	300	302
Plaintiff's 6	17	17	17
Plaintiff's 7	93	358	358
Plaintiff's 8	93	100	101
Plaintiff's 9	93	102	103

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